A recent case held the next highest candidate elected where a plurality of the votes was cast for a man who was known by most of the voters to have died ten days before the election, but under the belief, induced by reports widely circulated, that if his name secured a plurality, a vacancy would be created which could be filled by another man of his political beliefs. *State ex rel. Bancroft* v. *Frear*, 128 N. W. 1068 (Wis.). The case thus raises the question whether, in the rule as above quoted, the essential feature is the knowledge by the elector of facts known to disqualify, or the attitude of the elector in acting "so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise." [9] Here the former element was present, but the latter lacking. And it would seem that the latter is the essential feature. It has been held, though the question has been seldom raised, that courts cannot presume a willingness to waste a vote from the mere fact that the voter had notice that his candidate was dead [10] or ineligible.[11] And it is contrary to republican principles that a man should be declared elected whom a plurality of the electors have refused to endorse. Probably, the action of the plurality must be one of affirmative choice and not merely of dissent, and it might well be conceded that if the disapproval of the qualified candidate were expressed by votes for "a stick or a stone or for 'the man in the moon,'" as suggested by the opinion in the principal case, such disapproval would not be effective to prevent his election. But in the principal case a plurality of the voters, by reasonable, concerted action, did indicate an affirmative choice, either for the dead man or for a man of his political beliefs. It would seem a fairer decision, as more expressive of the will of the voters, that, when the vacancy could not be filled as expected, there had been no election.

EQUITABLE RELIEF FOR MISTAKE OF LAW. — Considerable uncertainty as to the scope of the jurisdiction of equity to give relief because of mistake, has arisen from a misapplication of the maxim that ignorance of the law excuses no one. Although several earlier decisions had denied its applicability to suits in equity,[1] Lord Ellenborough made it the basis of a decision against the recovery of payments made under a mistake of law, on an insurance policy.[2] Since then it has often been stated as a general rule that mistake, in order to be a ground for equitable relief, must be of fact and not of law; [3] but this rule has many exceptions. Thus

this country. Barnum *v.* Gilman, 27 Minn. 466; Gill *v.* Mayor and Aldermen of Pawtucket, 18 R. I. 281.

[9] People *ex rel.* Furman *v.* Clute, *supra.*

[10] State *ex rel.* Herget *v.* Walsh, 7 Mo. App. 142.

[11] Ransom *v.* Abbott, Taft, Senate Election Cases, 338; a case of disqualification under the Fourteenth Amendment, in which both the disqualifying fact and the law affecting it must have been well known to most of those voting. One ground for the decision was that there was a chance that one so disqualified might have his disabilities removed. See Barnum *v.* Gilman, *supra.*

[1] Lansdowne *v.* Lansdowne, 2 Jac. & W. 205; Simpson *v.* Vaughan, 2 Atk. 30.

[2] Bilbie *v.* Lumley, 2 East, 469.

[3] Bentley *v.* Whittemore, 18 N. J. Eq. 366; Fowler *v.* Black, 136 Ill. 363; Clapp *v.* Hoffman, 159 Pa. St. 531. See Hunt *v.* Rousmaniere, 8 Wheat. (U. S.) 174, 1 Pet. (U. S.) 1; 2 POMEROY, EQUITY JURISPRUDENCE, § 842; 1 STORY, EQUITY JURISPRUDENCE, § 111 *et seq.*

a mistake of foreign law is considered a mistake of fact.[4] When public moneys are paid under a mistake of law, they may be recovered;[5] and an officer of the court may not retain a payment made to him under a mistake of law.[6] Also, whenever mistake of law is combined with inequitable conduct by one party, including fraud,[7] or unfair use of superior knowledge,[8] equity will relieve the other.

Especially in the matter of reformation, the general rule has been relaxed. The process has involved much refinement of reasoning, particularly regarding different kinds of mistakes of law, mistake as to a party's existing legal rights generally being considered a sufficient ground for equitable relief.[9] Reformation is nearly always allowed when, in reducing a contract to writing, there has been a mistake in the use of words with a technical legal meaning.[10] The distinction, if any, between such a case and one where the parties are mistaken as to the legal effect of a writing which they agree on as representing their oral contract, though sometimes taken,[11] is too subtle, and has often been repudiated.[12] Thus, where the parties, intending to effect a mortgage, and in ignorance of a statute requiring the fact that a conveyance is only for security to appear on the deed, made an absolute deed and a separate contract for reconveyance on payment of the debt, reformation was allowed. *Forest Lake State Bank* v. *Ekstrand*, 128 N. W. 455 (Minn.). An examination of the decisions which have held mistake of law not to be a sufficient ground for reformation, is also instructive. In many, if not most of them, it is submitted that reformation would have been improper even if the mistake had been one of fact, though the true ground for the decision is not always given. Reformation has been refused where there was no clear proof of a former contract which the writing was intended to set forth, and to which it could be conformed;[13] and even if there were such a contract, if reformation would have caused an inequitable situation due to the intervention of a *bonâ fide* purchaser, or a change in the position of one of the parties.[14] In the absence of inequitable conduct by the other party, a mistake of law by one only has been held not to justify reformation,[15] and even if mutual, the mistake must have been material.[16] In

[4] Sampson *v.* Mudge, 13 Fed. 260.

[5] Wisconsin Central R. R. *v.* United States, 164 U. S. 190, 210; Allegheny County *v.* Grier, 179 Pa. St. 639.

[6] *Ex parte* James, L. R. 9 Ch. 609.

[7] Welles *v.* Yates, 44 N. Y. 525.

[8] Chelsea Nat. Bank *v.* Smith, 74 N. J. Eq. 275; Lyon *v.* Tallamadge, 14 Johns. (N. Y.) 501.

[9] Cooper *v.* Phibbs, L. R. 2 H. L. 149, 170; Marshall *v.* Lane, 27 D. C. App. 276. See 2 POMEROY, EQUITY JURISPRUDENCE, § 849.

[10] Pitcher *v.* Hennessey, 48 N. Y. 415; Lockwood *v.* Geier, 98 Minn. 317; Ryder *v.* Ryder, 19 R. I. 188. *Contra*, Atherton *v.* Roche, 192 Ill. 252.

[11] See Canedy *v.* Marcy, 13 Gray (Mass.) 373; Radebaugh *v.* Scanlon, 41 Ind. App. 109.

[12] Griswold *v.* Hazard, 141 U. S. 260; Wyche *v.* Greene, 16 Ga. 49. See 1 STORY, EQUITY JURISPRUDENCE, 11 ed., § 130, note.

[13] See Marshall *v.* Westrope, 98 Ia. 324; Kent *v.* Manchester, 29 Barb. (N. Y.) 595. This seems to be the explanation of the decision in the leading case of Hunt *v.* Rousmaniere, *supra*.

[14] Van Houten *v.* Van Houten, 68 N. J. Eq. 358; Jeakins *v.* Frazier, 64 Kan. 267; Nichols *v.* Leeson, 3 Atk. 573.

[15] Eldridge *v.* Dexter & P. R. R. Co., 88 Me. 191.

[16] Powell *v.* Smith, L. R. 14 Eq. 85, 90.

many cases, the written contract was a compromise of disputed claims, with which a court of equity would be slow to interfere.[17] All these decisions merely represent rules which are equally controlling when reformation is sought for mistake of fact.[18]

It appears, therefore, that in practice the courts make but a slight distinction between mistakes of law and of fact as grounds for reformation and other equitable relief. It is submitted that there really is no distinction, and that the rule against granting relief for mistake of law, emasculated as it is by many exceptions, should be entirely discarded.[19]

RIGHTS OF ACTION FOR INJURY TO THE PROPERTY OF A BANKRUPT. — The present Bankruptcy Act provides that "the trustee of the estate of a bankrupt . . . shall . . . be vested . . . with . . . rights of action arising . . . from . . . injury to his property." [1] A recent case holds that this section vests in the trustee a right of action for fraud inducing the bankrupt to buy property at a price greater than its value. *In re Gay*, 182 Fed. 260 (Dist. Ct., D. Mass.).

An early state decision held that an action for fraud on the bankrupt in the sale of goods was not vested in his assignee as a "debt due to the bankrupt." [2] The Bankruptcy Act of 1867 contained the same provision as the present act with regard to actions for injury to the bankrupt's property.[3] But under it, by the weight of authority, a right of action for fraud causing damage to property was held not to pass to the assignee.[4] In England, however, the trustee is vested with a right of action for false representations, where the damage has been to the estate of the bankrupt.[5] The only previous decision under the present federal statute agrees with the English rule and with the principal case.[6]

The course of judicial opinion as to rights of action for the abuse of legal process to the damage of the bankrupt's property affords a parallel to that of the decisions on actions for fraud. Under the early state laws a right of action for malicious attachment,[7] wrongful execution,[8] or excessive distress [9] did not vest in the assignee. Under the Act of 1867 an action for the malicious abuse of garnishment proceedings, to the dam-

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[17] See Pullen *v.* Ready, 2 Atk. 587; Gibbons *v.* Caunt, 4 Ves. 839.

[18] See 23 HARV. L. REV. 608–626.

[19] See Cooper *v.* Phibbs, *supra;* Bonbright *v.* Bonbright, 123 Ia. 305; Biggs *v.* Bailey, 49 W. Va. 188; Wisconsin Marine & Fire Ins. Co. Bank *v.* Mann, 100 Wis. 596; Richmond *v.* Ogden Street Ry. Co., 44 Or. 48; Wyche *v.* Greene, *supra;* Daniell *v.* Sinclair, 6 App. Cas. 181, 190.

[1] BANKRUPTCY ACT, 1898, § 70 *a* (6).

[2] Shoemaker *v.* Keely, 2 Dall. (Pa.) 213.

[3] BANKRUPTCY ACT, 1867, § 14.

[4] In the Matter of Crockett, 2 Ben. (U. S.) 514; *In re* Brick, 4 Fed. 804; Tufts *v.* Matthews, 10 Fed. 609. *Contra*, Hyde *v.* Tuffts, 45 N. Y. Super. Ct. 56. *Cf.* Byxbie *v.* Wood, 24 N. Y. 607.

[5] Hodgson *v.* Sidney, L. R. 1 Ex. 313; Warder *v.* Saunders, 10 Q. B. D. 114. *Cf.* Twycross *v.* Grant, 4 C. P. D. 40.

[6] *In re* Harper, 175 Fed. 412.

[7] Stanly *v.* Duhurst, 2 Root (Conn.) 52.

[8] Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19.

[9] O'Donnel *v.* Seybert, 13 Serg. & R. (Pa.) 54.